

Exhibit 5

Eric C. Wilhelmsen

December 19, 2003

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ORIGINAL

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE SOUTHERN DISTRICT OF OHIO

3 Western Division (Dayton)

4 - - - - - x Civil Action

5 THE PROCTOR & GAMBLE COMPANY, : No.: C-1-02-393

6 Plaintiff, : Hon. Walter Herbert

7 vs. : Rice (C.J.)

8 THE COCA-COLA COMPANY, : Hon. Sharon Ovington

9 Defendant. : (Magistrate)

10 - - - - - x Volume 2

11 Reston, Virginia

12 Friday, December 19, 2003

13 Continued Videotaped Deposition of ERIC C.

14 WILHELMSSEN, PH.D., a witness herein, called for

15 examination by counsel for Plaintiff in the

16 above-entitled matter, pursuant to notice, the

17 witness being duly sworn by KAREN YOUNG, a Notary

18 Public in and for the Commonwealth of Virginia,

19 taken at the offices of Hale and Dorr, 11951 Freedom
Drive, Suite 1400, Reston, Virginia, at 11:32 a.m.

20 on Friday, December 19, 2003, and the proceedings

21 being taken down by Stenotype by KAREN YOUNG, and

22 transcribed under her direction.

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1 A. To the extent the claims are construed to
2 cover product not requiring added acid, it is my
3 opinion that the claims are invalid for failing to
4 contain a written description of such a product.

5 Q. And where are you reading from?

6 A. This is paragraph 49 of my report.

7 Q. Okay. And the condition that you just
8 read -- that is the claim construction advocated by
9 Proctor & Gamble, isn't it?

10 A. The claim construction represented by
11 Proctor & Gamble -- you tell me. That's what I
12 understand it to be, but --

13 Q. That's your understanding of the claim
14 construction advocated by Proctor & Gamble, isn't
15 it?

16 A. Yes.

17 Q. And given that claim construction, it's
18 your opinion that the 847 patent lacks a written
19 description, isn't it?

20 A. Yes, paragraph 49.

21 Q. Now, to be clear though, even in your
22 opinion, there is an adequate written description in

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1 the 847 patent for a calcium-supplemented fruit
2 juice with added acid.

3 A. I did not bring up any arguments about an
4 adequate written description in that other case.

5 Q. In the case where if the 847 patent were
6 limited to calcium-supplemented fruit juice with
7 added acids, in your opinion, would there be
8 adequate written description?

9 A. Yes, to the extent that the examples and
10 all that provided, I would think it would be in the
11 realms of patents that I have read before, so that's
12 not a question that I have rendered a specific
13 opinion on. I don't -- but I would say yes.

14 Q. You agree with me, do you not, that the
15 claims of the 847 patent are product claims?

16 A. In this context, Counsel, what do you mean
17 by a product claim?

18 Q. As opposed to a method claim. Does that
19 terminology mean anything to you?

20 A. Yes, I do understand -- I have had
21 explained to me the difference, but the prosecution
22 history of this patent with its splitting makes that

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1 understanding is as I quoted from my report. That
2 was the basis that I used.

3 Q. When you formed your opinion about the --
4 whether or not the 847 patent has an adequate
5 written description, did any attorney tell you that
6 if the patent describes at least one method of
7 obtaining the claimed product, that it has an
8 adequate written description?

9 A. That is a detail that I cannot answer yes
10 or no to.

11 Q. You don't recall being told that?

12 A. That is a detail that I don't recall. I
13 can't say yes or no. I'm sorry. That's more
14 specific.

15 Q. Fair enough, but I want to focus a little
16 bit on what you think is lacking in the written
17 description of the 847 patent. Do you agree that
18 there is an adequate written description in the 847
19 patent -- strike that. Let's look at claim 1 of the
20 847 patent. Do you agree that there is an adequate
21 written description for a single strength fruit
22 juice beverage?

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1 A. Those words are relatively customary.
2 Obviously you want things in context. You have to
3 be very careful when you choose a word. If I tell
4 you or ask you are you going to pick up the check,
5 there's obviously two meanings, but single strength
6 fruit juice beverage -- those are relatively common
7 words. We've had some discussion already about what
8 a beverage is, and we could go through and repeat
9 that discussion if you think it's important.

10 Q. Is it your opinion that the phrase -- the
11 term -- strike that. Is it your opinion that the
12 claim element "A single strength fruit juice
13 beverage" lacks adequate written description?

14 A. No, I can -- I can interpret it.

15 Q. Okay.

16 A. I have.

17 Q. I'm sorry. Is it your opinion that the
18 claim element "Substantially free of added protein"
19 lacks an adequate written description?

20 A. The patent is not as clear as I would
21 like. The concept is pretty clear. You go into the
22 specification, they talk about this tenth percent,

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1 but it's not as clean as it might be, but the intent
2 of excluding products with we'll call it dairy
3 proteins added based on the prior art seems
4 apparent.

5 Q. So is it your opinion that it lacks an
6 adequate written description?

7 A. Depends on how you're slicing and dicing
8 on what's adequate. I think the inventor has
9 conveyed enough information that you can understand
10 that he was asserting products that did not have
11 added protein. I go back to the original
12 understanding I was giving, must reasonably convey
13 to one of ordinary skill in the art the inventor was
14 in possession of the invention at the time the
15 application was filed. He is talking about products
16 where somebody is using other than dairy proteins.

17 Q. Do you intend at trial in this matter,
18 Doctor, to offer the opinion that "Substantially
19 free of added protein" lacks adequate written
20 description?

21 A. No, it's not a serious bone of contention
22 in this matter. I don't expect to, but if --

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1 made so fine as to avoid the grittiness.

2 If somebody was using a similar product in
3 a juice product, the concept of solubilized becomes
4 confusing. It would be something that would not
5 have been anticipated at the time Heckert wrote this
6 patent. These are new ingredients. But do I expect
7 to testify in this way? Not with the facts in front
8 of me.

9 Q. Have you formed the opinion, Doctor, as
10 you sit here today, that the claim element "With
11 between point 05 and point 26 percent by weight
12 solubilized calcium" lacks an adequate written
13 description?

14 A. In the context of our discussions, I have
15 found no reason to challenge the methodologies used.

16 Q. Have you formed the opinion that the claim
17 element "At least 45 percent fruit juice" lacks an
18 adequate written description?

19 A. No.

20 Q. Have you formed the opinion that "With a
21 sugar content of between two degrees and 16 degrees
22 Brix" lacks an adequate written description?

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1 A. The language of the patent is not as
2 specific as it should be. That statement should say
3 "sugars" perhaps, because you have the problem that
4 sugar in usage is often sucrose as opposed to
5 glucose and fructose, and Brix doesn't measure
6 exclusively sugars. It measures dissolved solids.
7 It is commonly used to measure dissolved solids, but
8 its impact by organic acids and other solutes.

9 And so if you're going to use it exactly
10 as written, there's some uncertainty. It has not
11 been a major point of discussion in this patent, so
12 here again, I don't expect to be rendering
13 testimony, but if asked about the precision of the
14 method, yes, I have concerns.

15 Q. As you sit here today, Doctor, have you
16 formed the opinion that the claim element "With a
17 sugar content of between two degrees and 16 degrees
18 Brix" lacks an adequate written description?

19 A. I can -- we can talk about products where
20 it would generate indefiniteness, but they're not in
21 contention in this discussion, and so I don't expect
22 to render an opinion of that nature in this case.

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1 Q. Have you formed an opinion that the claim
2 element "Less than point 07 percent by weight
3 chloride ion" lacks an adequate written description?

4 A. No.

5 Q. So am I correct in understanding that the
6 key element missing, a written description, in your
7 opinion is the acid component?

8 A. I would agree that that is the key focus
9 of discussion.

10 Q. Would you agree, Doctor, that in
11 determining whether or not there's an adequate
12 written description for a claim element, one
13 considers not only the specification, but also the
14 original claims as they were filed with the patent
15 office? Has anybody ever explained that to you?

16 A. No.

17 Q. In determining whether or not the claims
18 of the 847 patent have an adequate written
19 description, did you consider the original claims
20 that were filed with the original application that
21 led to the 847 patent?

22 A. No.

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1 patent has to enable every method of making the
2 claimed invention or only one method of making the
3 claimed invention or some other understanding?

4 A. The legal standard is what I just read.
5 That's what I was using.

6 Q. So you didn't have any understanding on
7 the question I'm asking?

8 A. Repeat your question one more time.

9 Q. When you formed your opinion that the 847
10 patent was not enabled, did you have any
11 understanding about whether or not the law requires
12 that every method of obtaining the claimed product
13 must be enabled or only one method has to be enabled
14 or some other understanding?

15 A. I do not recollect a specific discussion
16 of those points. I may have heard it. This is what
17 I relied on for my opinion.

18 Q. Okay. You do not dispute, do you, Doctor,
19 that at a minimum, the 847 patent enables the premix
20 method of manufacturing the claimed products, right?

21 A. To the extent that the premix includes
22 added citric acid and added malic acid, no.

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1 Q. So under your claim construction, the 847
2 patent is enabled, right?

3 A. Well, no, actually, let's -- let's go back
4 and we should look at the section K of my report
5 where even if the Coca-Cola claim construction is
6 accepted, that then -- I think I have the right
7 section. No, that was the wrong section.

8 Q. Are you on I, if you look on page 39 --

9 A. Yes.

10 Q. That's obviousness.

11 A. Obviousness, okay.

12 Q. My question has nothing to do with
13 obviousness. My question is about enablement,
14 Doctor. You've offered the opinion that the claims
15 of the 847 patent are not enabled under P&G's claim
16 construction, right?

17 A. Uh-huh.

18 Q. My question is under your claim
19 construction, is the 847 patent enabled.

20 A. I think so.

21 Q. Do you understand that P&G's claim
22 construction excludes from the scope of the patent